

TESTIMONY OF TOM DEVINE  
GOVERNMENT ACCOUNTABILITY PROJECT

before the

HOUSE COMMITTEE ON OVERSIGHT AND REFORM  
SUBCOMMITTEE ON GOVERNMENT OPERATIONS

on

MERIT SYSTEMS PROTECTION BOARD CHALLENGES FOR  
WHISTLEBLOWER PROTECTION ACT ENFORCEMENT

February 28, 2019



MR. CHAIRMAN:

Thanks you for inviting my testimony. This hearing is timely and badly needed, because federal employees may be on the verge of losing their only guaranteed forum to enforce the merit system, including statutory free speech rights in the Whistleblower Protection Act (WPA) that Congress unanimously has passed or reaffirmed four times. By passing H.R. 1235 to allow the current Chair's term to be extended, the House already has done its share to keep the lights on for the merit system. This hearing is valuable to finalize a record for action, and to begin the hard work of finishing what Congress started in the Whistleblower Protection Enhancement Act. (WPEA)

My name is Tom Devine, and I serve as legal director of the Government Accountability Project. For over 40 years GAP has helped lead campaigns to draft, enact and/or monitor 34 local, state, national and international whistleblower laws or policies, ranging from the Civil Service Reform Act (CSRA) to the Whistleblower Protection Enhancement Act of 2012 (WPEA). This testimony also is presented on behalf of the Liberty Coalition, National Taxpayers Union, National Whistleblower Center, Project on Government Oversight, Public Citizen and the Taxpayer Protection Alliance. These organizations all were leaders in the 13 year struggle to enact the WPEA, as well as the 75 member bi-partisan, trans-ideological Make It Safe Coalition dedicated to whistleblower protection.

Although seldom in the public spotlight, no institution is more important for accountable government than the Merit Systems Protection Board (MSPB). It is the backstop for the merit system that since 1883 has sustained a non-partisan, professional civil service. It has monopoly enforcement authority for all merit system principles in the CSRA. The Board is the only body with authority to enforce U.S. Office of Special Counsel (OSC) investigative reports that find prohibited personnel practices and recommend corrective action. Only Board Members have



authority to order temporary relief for victims of merit system violations whose appeals frequently take years to resolve, and sometimes over a decade. Most significant, for federal employees the only available guaranteed forum to enforce their constitutional due process and civil service merit system rights are hearings governed by MSPB Administrative Judges. (AJ's) For non-unionized workers, it is their only chance for due process. While union employees also can pursue an arbitration, since they are not parties and do not control their cases, the MSPB also is their only guaranteed due process option. In short, without an MSPB there is no merit system.

Unfortunately, since January 2017 the MSPB has been dysfunctional, and it is in danger of becoming dormant. Answers to the Committee's specific queries for today are below, as well as recommendations for structural reform.

### HEARING TOPICS

EFFECTS OF BOARD VACANCIES. For two years the three Member Board only has had one Member, Mark Robbins. While he has performed beyond the call of duty as a public servant under impossible circumstances, they remain impossible.

\* *Backlog and delayed justice:* Without a quorum, the Board has been unable to issue any final decisions. From the most recent reports in the public record, this has led to a 2000 case backlog. While Chairman Robbins has drafted preliminary decisions, none have the authority of law. For new complainants, this means multi-year delays in receiving justice even for those whose rights eventually are enforced.

Even more frustrating, it exacerbates already inexcusable delays in cases pending before January 2017. Consider the plight of whistleblower Kim Farrington, whose nightmare I shared with the Committee that year. Ms. Farrington was an Aviation Safety Inspector for the Federal Aviation Administration (FAA) who was harassed and then fired after she challenged the



agency's failure to assure proper oversight of the training of flight attendants at an assigned airline. Her case has been pending now for nine years. In 2012 the Board issued an excellent decision overturning a hostile Administrative Judge (AJ) decision on numerous errors of law. But instead of reversing the ruling and giving Ms. Farrington her job back, the Board sent it back to the AJ for more work. The AJ then held a hearing on remand, but never issued a decision. When the AJ retired, a new judge was appointed who held another hearing in December 2013. After almost a year and half of no action, the parties jointly filed August 3, 2015 motion for status conference. The AJ never even acknowledged it. In May 2016 Ms. Farrington protested the delays to the full Board. The AJ promptly responded by issuing a June 2016 decision that rejected all of her claims. He acted without even referencing the hearing audio tape, half of which was inaudible. There was no transcript, because the court reporter had died during the delay. Her case again is on appeal to the full Board through a Petition for Review. However, due to the vacancies there is no end in sight. For a detailed description of her nightmare, *see* <https://www.linkedin.com/pulse/fly-by-night-faa-aviation-safety-given-second-wind-andersen>. Ms. Farrington is still waiting for a decision.

*\* Accountability for Administrative Judges:* AJ's are the soul of the merit system, because they preside over administrative due process hearings that are a federal employee's only "day in court." So a major duty of the Board is guidance on proper interpretation of employee rights. The prior Board, under Chairman Susan Grundmann and Vice Chair Robbins, was effective at providing that guidance. The consensus among employee rights groups is that while we often disagreed, they issued balanced, reasoned decisions that advanced the merit system.

Since the vacuum of appellate review, the track record of AJ's enforcing whistleblower rights has dropped sharply. The Board has reported that for FY 2017 there were 11 findings of





violations out of 162 decisions on the merits for alleged WPA violations, or 6.8%. U.S. Merit Systems Protection Board, *FY 2017 Annual Performance Report (APR) and Annual Performance Plan (APP) for FY 2018 (Final) and FY 2019 (Proposed)* (Feb. 12, 2018), at 55-57. The data was similar for FY 2016, when AJ's provided corrective action to whistleblowers in some 7% of cases. *FY 2016 Annual Performance Report (APR) and Annual Performance Plan (APP) for FY 2017 (Final) and FY 2018 (Proposed)* (Feb. 12, 2018), at 51.

Since data for the period without Board leadership is unavailable, I researched all AJ whistleblower decisions from last November through last month to check if there has been a significant change since the vacancies began. For decisions on the merits, the AJ track record was 1-29 against whistleblowers. To check further, I researched the track record for December 2017. The track record was 0-16, for a composite of 1-45, or 2.2%, over three times lower than with active Board oversight.

Without oversight, the decisions also have become more hostile to the structure of WPA rights, echoing the Federal Circuit Court of Appeals that forced Congress to pass the All Circuits Review Act to eliminate that court's monopoly on appellate review. To illustrate, during the period of dormant Board review, AJ interpretations have undermined the WPA by --

- \* contrary to Board precedent, rejecting hostile working environment as a personnel action providing jurisdiction to legally challenge;

- \* dismissing protection because the disclosure when made was unsupported with evidence, without considering whether the employee had supporting back-up evidence;

- \* dismissing a gross waste disclosure as a policy disagreement, without assessing the financial consequences;

- \* rejecting that job favoritism due to a sexual relationship could be abuse of authority;

- \* improperly applying the attorney-client privilege when there was no communication with an attorney, to prevent discovery of draft proposed sanctions that were significant for the whistleblower's case; and



\* failing to require that the agency produce evidence for its independent justification defense, despite a statutory requirement that it provide “clear and convincing evidence,”

Of particular significance is the last example – a pattern to reject the claims of employees who have proven their *prima facie* case of violation, on grounds that there is clear and convincing evidence the agency would have acted independently in the absence of whistleblowing. This standard is a cornerstone of the Whistleblower Protection Act. Referencing the congressional mandate and precedent, in *Miller v. Department of Justice*, 842 F.2d 1256 (F.3d 2016), the Federal Circuit Court of Appeals reaffirmed that the “clear and convincing” evidence standard --

is a high burden of proof for the Government to bear. It is intended as such for two reasons. First, this burden of proof comes into play only if the employee has established by a preponderance of the evidence that the whistleblowing was a contributing factor in the action—in other words, that the agency action was “tainted.” Second, this heightened burden of proof required of the agency also recognizes that when it comes to proving the basis for an agency’s decision, the agency controls most of the cards—the drafting of the documents supporting the decision, the testimony of witnesses who participated in the decision, and the records that could document whether similar personnel actions have been taken in other cases. In these circumstances, it is entirely appropriate that the agency bear a heavy burden to justify its actions. *Whitmore [Department of Labor]*, 680 F.3d at 1367 (quoting 135 Cong. Rec. H747–48 (daily ed. Mar. 21, 1989) (explanatory statement on Senate Amendment to S. 20)).

The court emphasized that uncorroborated testimony seldom is sufficient to meet the test; that direct and indirect motives should be considered; and that the scope should be broad to test for similarly situated employees.

Repeatedly disregarding this overall mandate and specific guidance, during the three months sampled Administrative Judges ruled against whistleblowers on the clear and convincing evidence defense in 15 out of 16 cases. This helps to explain why less than 3% of whistleblowers prevail after their “day in court.” It also suggests that in the absence of normal appellate review, AJ’s have not been respecting the legislative mandate.



\* *Administrative functions:* In addition to its due process responsibilities, the Board must approve final work-products significant to the merit system, such as relevant studies and reports. Without a quorum, these contributions have been stalled. To illustrate, the Board reported that two studies have not been released, because there has been no quorum for their approval.

CONFLICTS OF INTEREST AND MSPB INDEPENDENCE. A second issue is the validity of having an MSPB Member simultaneously serve as General Counsel for the Office of Personnel Management (OPM), dual roles currently filled by Mr. Robbins. As a rule we would be close minded even to the appearance of conflict of interest. But there are exceptions for every rule, and in this case a controlled structure could bypass tangible conflicts due to extraordinary circumstances.

It is extraordinary that this is the first time in four decades that the President has not timely nominated and the Senate timely confirmed a Board quorum. The 2,000 case backlog is unprecedented. Current Chair Mark Robbins' efforts beyond the call of duty to draft tentative decisions for those cases despite lacking enforcement authority is unprecedented. As a result of that extra effort, he can play a uniquely invaluable role in expeditiously overcoming the backlog. If he is recused from any OPM duties that concern the MSPB, he should be available to navigate the Board's journey on the road to recovery.

CONTINUING MSPB OPERATIONS WITHOUT A MEMBER ON MARCH 1, 2019.

Like the partial government shutdown, an MSPB shutdown would have destructive consequences. Even continued AJ operations without any Board Members would severely undermine the merit system.



Most fundamental, there are questions whether without Members the Board could operate under the constitution's Appointment Clause. There also has been discussion that Administrative Judges could issue preliminary but not binding decisions. Under either of these scenarios, there would be no temporary or final rulings to enforce the Civil Service Reform Act generally, and the Whistleblower Protection Act in particular.

The most obvious consequence is that justice will be further delayed even for employees who ultimately prevail. Currently agencies and whistleblowers settle between 10-25% of appeals. A shutdown would prolong or even instigate unnecessary conflict by eliminating all agency incentive to settle any case. That is because during a shutdown, every agency would be winning in any action against any employee until the Board again could stop it. Indeed, during a Board shutdown every agency basically could act with impunity, creating the specter of personnel anarchy.

Today AJ's can continue to make decisions reviewable by circuit courts of appeal, with employees choosing to bypass administrative appeals. There is no question, however, that losing parties immediately will challenge the legality of decisions against them. There no longer will be a guarantee of enforceable decisions from any due process forum. Even if that option remains available, there would be severe consequences. As seen above, AJ's badly need renewed, intensified guidance on the Whistleblower Protection Act from a knowledgeable, committed Board. While not the subject of today's hearing, that places a special responsibility on the Senate for its advice and consent responsibilities.

Most directly, a Board shutdown would erase enforcement capacity for the Office of Special Counsel. Most immediately, it would cancel prior emergency legislation allowing the Special Counsel to seek stays of personnel actions from one Board Member. There would not be





one Member left. Stays are an indispensable resource for the Special Counsel to make a difference. They not only freeze retaliation that otherwise would be a long term *fait accompli*, but provide leverage to enforce corrective action settlements in disputes that agencies otherwise would drag out indefinitely. The OSC often obtain stays informally, because the Board grants deference to OSC petitions. Similarly, the Board would be unavailable to enforce OSC corrective action recommendations when an agency balks. We are confident that special counsel Henry Kerner will creatively seek to minimize the damage. But scrambling is no substitute for statutory authority. Depriving the OSC of Board enforcement would dilute the merit system's most effective resource to an advisory body.

### STRUCTURAL REFORM

The crisis addressed above is symptomatic of a more basic challenge for Congress than this crisis. There must be structural reform before the Whistleblower Protection Enhancement Act can provide credible rights that do justice to its mandate. The current emergency is symptomatic of a much more fundamental breakdown. The WPEA left some significant structural issues unresolved, and it is time for Congress to finish what it started. A menu of Make Is Safe Coalition recommendations is attached.

The Achilles heel is weak due process. Federal employees are the only significant part of the labor force whose whistleblowers do not have access to jury trials for justice free of political pressure. With the backlog, the Board needs a safety valve for its docket now more than ever before. Few unemployed whistleblowers can afford a jury trial in federal court, however. Nearly all must rely on administrative remedies. Unfortunately, as seen above Administrative Judges



have not yet accepted the law's mandate. Mandatory training could help them understand and honor it.

The law's retaliation shield also badly needs to be broadened and made more accessible by giving employees enforcement teeth currently only available for the Special Counsel. One inexcusable loophole deprives employees of the right to challenge retaliatory investigations in the absence of a subsequent personnel action. Closing it would permit employees to challenge that routine form of harassment, before the probes can become criminal referrals or prosecutions for which there is no merit system defense. The loophole has left whistleblowers defenseless against an uglier form of retaliation that has become increasingly popular since the WPEA made traditional forms of harassment more difficult.

Similarly, the law should make it realistic for employees to seek stays of personnel actions. While the Board routinely grants OSC requests, it is not a credible option for the employee to seek temporary relief. Personnel actions should be frozen whenever the employee meets the burdens to prove a *prima facie* case of prohibited personnel practice. For the reasons discussed above, this initiative would have unsurpassed impact to strengthen the merit system.

Mr. Chairman, with the handicaps I have outlined in my testimony, whistleblowers understandably feel that they do not have access to justice, despite highly-publicized rights in the Whistleblower Protection Act. They need more love from Congress to trust the WPA. Thank you for today's hearing, which is a necessary first step. The whistleblower rights community will do its share to follow through.

